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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 834

SIMONE SCOZZARI,
Petitioner,

vs.

GEORGE K. ROSENBERG, District Director for Immigration and Naturalization Service, Los Angeles, California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The petitioner, Simone Scozzari, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the lower Court's dismissal of a petition for review filed in the case of your petitioner.

OPINIONS BELOW

The decision of the District Director, Immigration and Naturalization Service, Los Angeles, California, denying petitioner's application for adjustment of status under Section 249 of the Immigration and Nationality Act (8 USCA 1259) is printed at pages 56 through 59 in the Transcript of Record. The order of the Acting Regional Commissioner, Southwest Region, Immigration and Naturalization Service, is printed at pages 60 through 62 in the Transcript of Record. The order of the District Court (without opinion) dismissing said petition for review is printed at pages 8 through 15 in the Transcript of Record. The opinion of the Court of Appeals for the Ninth Circuit has not as yet been officially reported, but is printed in Appendix A, pages i-iii, attached hereto.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on January 26, 1962. Appendix B, hereto, p. iv. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is a deportable alien who files an application for adjustment of status to that of a lawful permanent resident, pursuant to the provisions of Section 249 of the Immigration and Nationality Act, entitled to a hearing which meets the Constitutional requirements of procedural due process of law?

2. Is an order denying an application, committed to administrative discretion, arbitrary and capricious where such order is based on non-confidential evidence dehors the record?

STATUTES INVOLVED

Section 249 of the Immigration and Nationality Act, as amended August 8, 1958 by Public Law 85-616, 72 Stat. 546, 8 USCA 1259:

"Record of admission for permanent residence in the case of certain aliens who entered the United States prior to June 28, 1940.

A record of lawful admission for permanent residence may, in the discretion of the Attorney General, and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application, or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship."

STATEMENT OF THE CASE

Petitioner is an alien, a native and citizen of Italy, who entered the United States as a stowaway in about 1923. On January 21, 1958, respondent served upon petitioner an order to show cause and notice of hearing in deportation proceedings. Upon insistence of counsel, the matter was continued by respondent until January 31, 1958, at which time a hearing in deportation proceedings was conducted by subordinate officials of the respondent herein. At the conclusion of that proceeding, it was directed that petitioner be deported from the United States.

On appeal from said adverse decision, the Board of Immigration Appeals inter alia, under date of July 2, 1958, directed that the case of petitioner herein be remanded to the Immigration and Naturalization Service for the purpose of affording petitioner an opportunity to file an application to create a record of lawful entry into the United States for permanent residence, pursuant to the provisions of Section 249 of the Immigration and Nationality Act (8 U.S.C.A. 1259). Pursuant to such order, on September 8, 1958 petitioner filed, on an appropriate form provided by the Immigration and Naturalization Service, an application to create a record of admission for permanent residence under Section 249 of the Immigration and Nationality Act (T. 16-19). In connection therewith, petitioner was questioned on December 10, 1958 (T. 21-50). In support of his claim, petitioner submitted the Certificate of his Marriage to a United States citizen (T. 52), and the birth record of his

wife (T. 51). Two witnesses who personally appeared at the Los Angeles Office of the Immigration and Naturalization Service on the same date were interrogated and affidavits were executed by them (T. 54-56). Without any further proceedings or offering petitioner an opportunity to present evidence, the District Director, Immigration and Naturalization Service, Los Angeles, on March 6, 1959 denied said application for numerous reasons which find no support whatsoever in the record (T. 56-59), and this decision was thereafter affirmed by the Acting Regional Commissioner, following appeal, on April 1, 1959 (T. 60-62). This action was filed in the United States District Court seeking review of the foregoing administrative process (T. 3-5).

REASONS FOR GRANTING CERTIORARI

This writ of Certiorari is sought because the issues presented herein raise important Constitutional questions regarding due process of law as well as important questions pertaining to the administration of the immigration and nationality laws of the United States. In addition, the decision below is in conflict with decisions of this Court and contrary to decisions of other Circuits.

I. THE DECISION OF THE COURT BELOW, IN EFFECT, HOLDS THAT THE IMMIGRATION AND NATURALIZATION SERVICE NEED NOT CONDUCT A HEARING THAT MEETS THE MINIMUM REQUIREMENTS OF PROCEDURAL DUE PROCESS OF LAW WHEN CONSIDERING AN APPLICATION FOR ADJUSTMENT OF STATUS COMMITTED TO ADMINISTRATIVE DISCRETION.

The Fifth Amendment to the Constitution of the United States provides that "no person shall * * * be deprived of life, liberty or property, without due process of law * * *". An alien, even though here illegally, is entitled to a full and fair hearing which conforms to the traditional standards encompassed in procedural due process of law.

Galvan v. Press, 347 U.S. 522, 530;

Shaughnessy v. U.S., ex rel Ignato Mezei, 345 U.S. 206, 212;

Kwong Hai Chew v. Colding, 344 U.S. 590, 598;

Wong Yang Sung v. McGrath, 339 U.S. 33, 49, 50;

Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 100.

If the Government's contention is correct, it would mean that the Immigration and Naturalization Service has a power greater than Congress, through whom the Service derives its authority. It would mean that that administrative body could either grant beneficial relief or deny the benefits thereof without developing all of the facts pertaining thereto.

In *Kwong Hai Chew v. Colding*, 344 U.S. 590, at pages 596-597, this Court held:

"He may not be deprived of his liberty or property without due process of law. Although it may be later established as respondents contend, that petitioner can be expelled and deported, yet, before his expulsion he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal. Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, this Court stated:

"The Constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every enactment of that body."

In *Bridges v. Wixon*, 326 U.S. 135, this Court stated at page 154:

"Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

In *Han Lee Mao v. Brownell*, 207 F. 2d 142, 146, the Court of Appeals for the District of Columbia considered the Constitutionality of the Attorney General's failure to accord that plaintiff a hearing on his right to depart from the United States. There, the Court stated:

"The case turns on the question whether a due process hearing is a condition precedent to an

> order permitting Mao, who is not an enemy, to leave the country. The fact that the Passport Act does not in terms require the Attorney General to grant a hearing before denying exit permission does not necessarily mean that the alien is not entitled to be heard, for if the Constitution requires a hearing, the statute must be read as commanding that it be afforded."

The Court of Appeals for the Second Circuit, in the case of *United States ex Murff*, 260 F. 2d 610, when considering a case involving a Hungarian refugee granted temporary parole into the United States at the discretion of the Attorney General, concluded that a hearing was required prior to revocation of parole, stated at page 615:

> "However, the grave Constitutional implications of a decision that appellant is not entitled to the hearing he seeks are clear. Were the views advanced by the Government adopted it is difficult to see how the statute, interpreted to authorize deportation of appellant without a hearing on the merits, could satisfy the requirements of due process."

Petitioner's application for adjustment of status presented a substantial issue which could only be determined after a full and complete hearing. Certainly, by no stretch of the imagination, can it be concluded that informal interrogation by an investigator meets the prescribed standards of administrative conduct.[1]

[1] New regulations, effective January 23, 1962 (26 Fed. Reg., No. 203, pages 9858-9860) transferred to Special Inquiry Officers authority to decide applications for adjustment of status under Section 245 and 249 of the Immigration and Nationality Act.

Failure to grant a quasi-judicial hearing which conforms to the traditional safeguards of due process is fatal. Irregular or nonconforming procedural practices are violative of the essence of liberty, as set forth in the Constitution of our nation. This administrative practice, even though established with the best of intentions, should be curtailed.

It is inconceivable that a practice denying an alien a hearing without fair notice of the charges, an opportunity to know what evidence is offered or considered, an opportunity to explain or refute or the benefit of confrontation should be condoned by this Court. The warning of Mr. Chief Justice Vinson in *Stack v. Boyle*, 342 U.S. 1, 6, that we should not "inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against * * *" is particularly appropriate in the setting of the instant case. In effect, the decision of the Court below, contrary to *Price v. Johnson*, 334 U.S. 266, 291, made a "factual determination" that petitioner was granted a fair hearing "where the crucial facts have not been developed."

Also compare:

Walker v. Johnson, 312 U.S. 275, 285, 287;
Holiday v. Johnston, 313 U.S. 342, 350.

The decision of the Court below holds that this alien, and other aliens similarly situated, can be denied statutory administrative relief without a formal hearing. This is an issue which involved substantial Constitutional rights which should be resolved by this Court.

2. **THE DECISION OF THE COURT BELOW HOLDS THAT THE IMMIGRATION AND NATURALIZATION SERVICE MAY IN ALL MATTERS CONSIDER EVIDENCE DEHORS THE RECORD.**

The decision of the Court of Appeals involves an important question of Federal law which has not been but should be settled by this Court.

In the case of *Jay v. Boyd*, 351 U.S. 345, this Court stated at pages 357-358:

> "As we have already stated, suspension of deportation is not given to deportable aliens as a right, but, by Congressional direction, it is dispensed according to the unfettered discretion of the Attorney General. In the face of such a combination of factors we are constrained to construe the statute as permitting decisions based upon matters outside the administrative record at least when such action would be reasonable."[8]

It would appear that the Court intended to limit the cited rule to those cases where "the disclosure * * * would be prejudicial to the public interest, safety, or security".

In *Kessler v. Strecker*, 307 U.S. 22, at page 34, this Court stated:

> "If the hearing was fair, if there was evidence to support the finding of the Secretary and if no error of law was committed, the rule of the Department must stand and can not be corrected in judicial proceedings. If, on the other hand, one of the elements is lacking, the proceeding is void and must be set aside."

[8] However, compare *Peters v. Hobby*, 349 U.S. 331; *Vitarelli v. Seaton*, 359 U.S. 535, and *Greene v. McElroy*, 360 U.S. 474.

The same rule was expressed by this Court in the case of *Kwock Jan Fat v. White*, 253 U.S. 454, 464, 40 S. Ct. 566, 570:

> "It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, on proceedings for review, within limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which executive officers proceed to judgment."

The administrative decision was arbitrary and capricious and not supported by the evidence. The District Director stated that "the applicant attended a meeting * * * in Apalachin, New York and was one of some sixty individuals in attendance who were questioned by the Police as to the purpose of the meeting. Police departments have described the persons who attended as representative of the criminal element in the United States. The applicant was accompanied to Apalachin, New York by Frank Desimone, a well-known figure among the criminal elements in Southern California who was recently convicted of contempt of Court * * *. * * * The applicant admits association with many other persons publicly known to have police records" (T. 59). The administrative record fails to show petitioner's association with any or all of the named individuals, nor is there any evidence in the record to show that the

petitioner participated in any of their past or present activities. More important, there is nothing in the record to show the period of association, the extent of such association or petitioner's knowledge concerning the background or records of the parties concerned. See *U.S. v. Buffalino*, 2 Cir., 285 F. 2d 408. There is no evidence of record to establish that Frank Desimone was a well-known figure among the criminal element in Southern California nor that he was recently convicted of contempt of Court, if that at all has any bearing on this case.

Though not specifically set forth, it is evident that the decision of the Regional Commissioner is founded upon the same ground. The petitioner did not have a full and fair opportunity to establish his claim. Due process of law assures, at the least, that one entitled thereto will be afforded those procedures which accord him the "rudiments of fair play". *Chicago M. & St. Paul R. Co. v. Poll*, 232 U.S. 165, 168.

In *Morgan v. United States*, 304 U.S. 1, at pages 14-15, this Court stated:

> "* * * liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a full and open hearing essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'"

At page 21 thereof:

> "While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding * * * places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them * * *."

There is no point in having an administrative hearing and preserving a full record thereof if it is possible for an administrative agency to exercise its discretion on matters outside of the record. If such were the case, that hearing would be nothing but a sham. Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo*, 323 U.S. 283. Any exercise of discretion must be consistent "with the fundamental principles of justice embraced within the conception of the due process of law." *Tang Tun v. Edsell*, 223 U.S. 673. *Joint Fascist Refugee Comm. v. McGrath*, 341 U.S. 123; *Carlson v. Landon*, 342 U.S. 524.

Improper and illegal consideration of matters outside the record so taints these proceedings that the decision is an arbitrary and capricious abuse of discretion. The Court below, contrary to these recognized principles, concluded otherwise.

CONCLUSIONS

If the fate of this petitioner alone were at stake, the case might be of small account. It is our entire democratic processes themselves that are involved. Procedural due process are not mere catchwords—they are guides for conduct which protect certain basic human rights. To prevent the abuse of the extraordinary powers granted the Immigration and Naturalization Service, judicial intervention is appropriate herein. The decision below is in conflict with decisions of this Court and with rules prevailing in other Circuits.

Whether the Immigration and Naturalization Service may consider confidential evidence outside an official record involves an important question of federal procedure and practice. Denial of such an application without a hearing which meets the minimum requirements of procedural due process of law is tantamount to banishment and exile, contrary to the principles of our form of government.

For the reasons set forth, it is respectfully submitted that this petition for writ of Certiorari should be granted.

Dated, San Francisco, California,
March 28, 1962.

Respectfully submitted,
JOSEPH S. HERTOGS,
Attorney for Petitioner.

G. NARSON BRUMBAUGH,
Of Counsel.

(Appendices "A" and "B" Follow)

Appendix "A"

United States Court of Appeals for the Ninth Circuit

SIMONE SCOZZARI,

Appellant,

vs.

GEORGE K. ROSENBERG, District Director Immigration and Naturalization Service, Los Angeles, California,

Appellee.

No. 17,349

Jan. 26, 1962

Appeal from the United States District Court for the Southern District of California Central Division

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges.

CHAMBERS, Circuit Judge:

Scozzari, a citizen of Italy, came into the United States as a stowaway on a boat in 1923. He seems to have been free of problems with the Immigration Service until 1958, when administrative proceedings were commenced on his deportability. Such proceedings were concluded in 1959. The order was that he be deported. Merged into the proceedings was an application to create a record of Admission for Perma-

nent Residence under Section 249* of the Immigration and Nationality Act. This application was denied on the ground that Scozzari had failed to establish that he was a person of good moral character.

Administrative proceedings exhausted, Scozzari sought a review by declaratory judgment in the United States District Court for the Southern District of California. There the trial judge after an examination of the immigration file, granted a motion for summary judgment.

In its findings and conclusions, the court found that there was reasonable, substantial and probative evidence to support the administrative finding that Scozzari had failed to establish he is a person of good moral character, a prerequisite for the grace of Section 249. It was further found that the administrative determinations were not arbitrary, capricious and that there was no abuse of discretion.

On appeal, we agree.

Segregating each facet of appellant's record in this country and inspecting it might lead one to think perhaps that the immigration authorities were unduly strict. But the totality of the record would indicate that the denial of the grace of the statute was eminently proper, assuming that a determination under Section 249 is subject to full review. (This we do not decide.)

---

*Section 249 of the Immigration and Nationality Act, 66 Stat. 219, as amended by Public Law 85-616, 72 Stat. 546, 8 U.S.C.A. § 1259.

The government's evidence was sufficient as a basis for denial. And, the evasiveness and improbability of some of appellant's answers under oath at one of the hearings are something that even an appellate court can see.

Appellant asserts a lack of due process. We find none.

Judgment affirmed.

(Endorsed) Opinion Filed Jan. 26, 1962.

Frank H. Schmid, Clerk.

Appendix "B"

United States Court of Appeals
For the Ninth Circuit

SIMONE SCOZZARI, *Appellant,* vs. GEORGE K. ROSENBERG, District Director Immigration and Naturalization Service, Los Angeles, California, *Appellee.*	No. 17,349

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, it is nowhere ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 26, 1962.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

SIMONE SCOZZARI, PETITIONER

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 73-74; Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1962 (R. 75; Pet. App. B). The petition for a writ of certiorari was filed on April 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's application to the Attorney General to exercise favorably his discretion to creat-

a record of lawful admission for permanent residence under Section 249 of the Immigration and Nationality Act of 1952 could properly be denied.

STATUTES AND REGULATIONS INVOLVED

Section 5 of the Administrative Procedure Act of 1946, 60 Stat. 239, 5 U.S.C. 1004, provides in pertinent part:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *
>
> (a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * *
>
> (b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

Section 249 of the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 72 Stat. 546, 8 U.S.C. 1259, provides in pertinent part:

> A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may

prescribe, be made in the case of any alien * * * if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers and other immoral persons, * * * and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

Immigration and Naturalization Regulation 103.2, 23 Fed. Reg. 9121, 8 C.F.R. (1964 Supp.) 103.2, provided in pertinent part:

Every formal application or petition shall be filed in accordance with the instructions contained thereon, such instructions being hereby incorporated into the particular section of the regulations requiring its submission. * * * Any required oath may be administered by an immigration officer or person generally authorized to administer oaths. The decision-rendering Service officer may, in his discretion, require the submission of additional evidence, including blood tests, may require the taking of testimony, and may direct the making of any necessary investigation. * * *

Immigration and Naturalization Regulation 249.1, 23 Fed. Reg. 6545, 8 C.F.R. 249.1, provided:

Any alien who believes that he meets the eligibility requirements enumerated in section 249 of the Act shall apply on Form N-105 to

the district director having jurisdiction over his place of residence. The applicant shall be notified of the decision and if the application is denied of the reasons therefor and of his right to appeal within 10 days from the receipt of such notification in accordance with Part 7 of this chapter. If the application is granted, a Form I–151, showing that the applicant has acquired the status of an alien lawfully admitted for permanent residence, shall not be issued until the applicant surrenders any other document in his possession evidencing compliance with the alien registration requirements of former or existing law.

STATEMENT

1. Petitioner is a 62-year-old native and citizen of Italy, who entered the United States in the summer of 1923 as a stowaway (R. 9, 23). He claims to have resided in the United States continuously since that time.

In January 1958, deportation proceedings were instituted against petitioner under several provisions of Section 241(a) of the Immigration and Nationality Act (12 U.S.C. 1251(a)).[1] After a hearing, petitioner

[1] Petitioner was charged with being deportable because he entered the United States without inspection, in violation of Section 241(a)(2) of the Act; at the time of entry he was a stowaway, in violation of Section 3 of the Act of February 5, 1917, and was therefore in an excludable class in violation of Section 241(a)(1) of the Act; at the time of entry he had no valid immigration visa in violation of the Immigration Act of 1924 and was therefore in an excludable class in violation of Section 241(a)(1) of the Act; at the time of entry he was within an excludable class in violation of Section 241(a)(1) of the Act because he had no valid passport as required by the

was ordered deported (R. 9–10). While his appeal to the Board of Immigration Appeals was pending, petitioner requested the Board to terminate the deportation proceedings and allow him an opportunity to create a record of lawful admission for permanent residence pursuant to Section 249 of the Immigration and Nationality Act of 1952, *supra*. On July 2, 1958, the Board held that the evidence was insufficient to sustain two of the deportation charges, and remanded the case for the purpose of allowing petitioner to make application for the creation of a record of lawful admission for permanent residence under Section 249 of the Act. The Board deferred final action on the three remaining deportation charges.

2. On September 8, 1958, petitioner filed with the Immigration and Naturalization Service, Los Angeles, California, an application to create a record of admission for permanent residence. On December 10, 1958, petitioner and his attorney appeared before an Immigrant Inspector. Petitioner testified and submitted documentary evidence in support of his application.

a. Petitioner's testimony showed that he entered the United States in the summer of 1923 as a stowaway on board the SS "Conte Rosso" (R. 9, 22–23). He lived with his brother in the New York area for about four years and did construction work (R. 28). In 1927, petitioner moved to California where he has resided up to the present time. He testified that he

---

Passport Act of May 22, 1918; and he failed to furnish notification of address or other information required under the reporting provisions of Section 265 of the Immigration and Nationality Act of 1952, in violation of Section 241(a)(5) of the Act.

did farm work for eight or nine years until about 1936 or 1937, during which time he accumulated an aggregate amount of about $5,000 (R. 28–31). He has not worked since that time, and is now "retired" (R. 28–29).

In 1945, petitioner and a partner put up about $16,000 for the purchase of an apartment house in Hollywood, California (R. 31). Petitioner's share of the down payment, he said, came from a loan of about $7,500 or $8,000 from his brother in 1927 (R. 31, 33–34). Petitioner's brother died before 1930. Petitioner did not know the nature of his brother's business prior to his death (R. 32). Petitioner realized an income of about $150 per month from the apartment house. During this general period, petitioner invested and lost about $5,000 in a California corporation which turned out to be a financial failure (R. 35–36).

b. In 1929, petitioner filed in the district court a declaration of intention to become a United States citizen under the name of "Carlo Di Nello" (R. 37–38). The application recited that Di Nello entered the United States in January 1923 as a passenger aboard the SS "Conte Rosso" (R. 38). Petitioner testified that he did not know how he obtained the identity of Di Nello[2] (R. 38). Petitioner did not obtain United States citizenship.

Petitioner testified that there were false statements contained in his 1940 Alien Registration Form filed

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[2] The records of the Immigration and Naturalization Service showed that "Carlo Di Nello," a passenger on board the SS "Conte Rosso" in 1923, entered the United States through New York City on January 15, 1923, and was admitted for permanent residence.

with the Immigration and Naturalization Service. For example, he was never employed as a flower salesman—an occupation which he listed in the form (R. 29, 38–39).

c. Between 1929 and 1951, petitioner had been convicted on four occasions for gambling. On March 27, 1931, he was convicted for failure to report a gunshot wound to another person and his failure to summon aid (R. 36–37). In connection with the latter offense, petitioner said that he did not remember any of the details (R. 37). Petitioner was arrested on other occasions in California, and had been arrested once while serving in the Italian army (R. 36–37).

On November 14, 1957, petitioner and one Frank De Simone attended a gathering at the home of Joseph Barbara in Apalachin, New York (R. 44–46). Petitioner did not know who invited him to the gathering. He met many people at that gathering, but could not remember any of their names other than De Simone (R. 47).

d. In July 1958—after deportation proceedings had been instituted against him—petitioner married one Theresa Macri, who was a United States citizen (R. 39, 51–52). He said that he had lived with Theresa for about three or four years, during which time he and Theresa were known as "Mr. and Mrs. Macri," but that he had not lived with her as husband and wife (R. 40). Petitioner had "always promised" to marry Theresa, but *had not done so* earlier because he had been sick (R. 40–41).

On March 6, 1959, the District Director of the Immigration and Naturalization Service denied the application for discretionary relief under Section 249 of the Act on the ground that petitioner had failed to establish that he was a person of good moral character (R. 56–59). The denial was based upon petitioner's false statements contained in his 1929 and 1940 papers; his prior convictions and criminal record; his attendance at the Apalachin gathering and association with underworld figures; and his relationship with Theresa Macri prior to their marriage. On March 27, 1959, the denial was affirmed by the Acting Regional Commissioner (R. 60–62).

3. Thereafter, on May 18, 1959, petitioner's deportation hearing was resumed before the Special Inquiry Officer who had presided at the 1958 hearing. At this hearing, documents and testimony relating to petitioner's application to create a record of admission for permanent residence were introduced into evidence. On May 29, 1959, petitioner was ordered deported on the grounds (1) that he was within an excludable class of aliens at the time of his entry within Section 3 of the Act of February 5, 1917 (pertaining to stowaways), in violation of Section 241(a)(1) of the Act; (2) that he was within an excludable class of aliens at the time of his entry within the meaning of the Passport Act of May 22, 1918 (pertaining to aliens without passports or similar entry documents), in violation of Section 241(a)(1) of the Act; and (3) that he entered the United States without inspection, in violation of Section 241(a)(2) of the Act. Petitioner thereafter appealed the order

to the Board of Immigration Appeals, which, on September 28, 1959, dismissed the appeal.

4. Petitioner filed a complaint in the District Court for the Southern District of California on December 30, 1960, to enjoin the enforcement of the deportation order on the ground that the denial of his application to create a record of admission for permanent residence was unlawful, unsupported by evidence, and based upon matters *dehors* the record (R. 3-5). Thereafter, the government moved for summary judgment under Rule 56, F.R. Civ. P. After holding a hearing on the motion, the district court, on March 10, 1961, granted summary judgment for the government (R. 8-15). The court of appeals affirmed on January 26, 1962 (R. 73-74, 75; Pet. App. A, B).

ARGUMENT

Summary judgment was properly entered against petitioner by the district court because there was no genuine issue of material fact to be tried and the government was entitled to judgment as a matter of law. Rule 56, F.R. Civ. P. Petitioner's claim (Pet. 10-13) that the action of the District Director in denying relief under Section 249 of the Act was based upon evidence outside the administrative record is refuted by the fact that the record shows that petitioner failed to establish that he was a person of good moral character. The District Director found, on the basis of the information set out in the Statement, *supra*, pp. 6-7, that petitioner submitted false and fraudulent documents to the district court and the Immigration and Naturalization Service in con-

nection with his status as an alien; he possessed a criminal record which spanned two decades; he associated with known criminals; and he had lived for a considerable period of time with a woman whom he did not marry until after the deportation proceedings had begun. These findings were in considerable part based on petitioner's own testimony. Insofar as petitioner attempted to answer some of the allegations, the court below said (R. 74; Pet. App. A) that "the evasiveness and improbability of some of [his] answers under oath at one of the hearings are something that even an appellate court can see."

There is equally no merit to petitioner's contention (Pet. 6–9) that he was denied a "full and complete hearing" on his application to create a record of admission for permanent residence. Section 5 of the Administrative Procedure Act (*supra*, p. 2) requires that certain procedures be followed "[i]n every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Section 249 of the Act, however, which provides for the discretionary relief here involved, does not require that the adjudication "be determined on the record." Since the Regulations, *supra*, pp. 3–4, likewise do not provide for a formal hearing, such a hearing was not required.

Petitioner received full and fair treatment in the proceedings before the Immigrant Inspector. He was sworn as a witness and testified in support of his application. He was permitted to introduce into the record documentary evidence, including affidavits of third parties with respect to the issue of good moral

character (see R. 51-56). His attorney was present and was permitted to make objections to questions put to petitioner by the Immigrant Inspector (R. 21, 26-27, 48). The fact that the District Director concluded that petitioner had failed to establish that he was a person of good moral character of course does not mean that petitioner was denied due process or in any way treated improperly.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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